

**Kankakee Valley Rural Electric Membership Corp.
and International Brotherhood of Electrical
Workers, Local 1393, AFL-CIO-CLC. Case
25-CA-28011-1**

April 7, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On December 18, 2002, Administrative Law Judge John T. Clark issued the attached decision. The General Counsel filed limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below¹ and to adopt the recommended Order as modified and set forth in full below.²

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5.

"5. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union by unilaterally failing and refusing to grant, since January 1, 2002, (1) annual wage increases to employees in the unit; (2) biannual wage increases to apprentice linemen and groundmen who are employees in the unit; and (3) matching 401(k) retirement plan contributions to employees in the unit, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to any changes in terms and conditions of employment."

¹ No exceptions have been filed to the judge's findings that the Respondent failed and refused to bargain in good faith with the Union by unilaterally failing and refusing to grant, since January 1, 2002 (1) annual wage increases to employees in the unit; (2) biannual wage increases to apprentice linemen and groundmen who are employees in the unit; and (3) matching 401(k) retirement plan contributions to employees in the unit, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to any changes in terms and conditions of employment. However, the judge inadvertently omitted reference to the unilateral nature of the changes from the conclusions of law. Therefore, we will amend the conclusions of law to correct this omission.

² Pursuant to the General Counsel's limited exceptions, we have modified the judge's recommended Order to reflect all the violations found. We shall substitute a new notice to conform to the Order.

No exceptions have been filed to the judge's recommendation that the Union's certification year be extended in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). However, the General Counsel requests that the *Mar-Jac* remedy be included in the Order and notice. Accordingly, the Order and notice provide that the 1-year extension of the initial year of certification shall begin on the date that the Respondent commences to bargain in good faith with the Union.

ORDER

The Respondent, Kankakee Valley Rural Electric Membership Corp., Wanatah, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local 1393, AFL-CIO-CLC as the exclusive collective-bargaining representative of the employees in the following appropriate unit, by unilaterally failing and refusing to grant (1) annual wage increases to employees in the appropriate bargaining unit set forth below; (2) biannual wage increases to apprentice linemen and groundmen who are employees in the appropriate bargaining unit set forth below; and (3) matching 401(k) retirement plan contributions to employees in the appropriate bargaining unit set forth below, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to any changes in terms and conditions of employment:

All full-time and regular part-time linemen, crew leaders, groundmen, operators, apprentices and tree-trimmers employed by the Respondent at its Wanatah, Indiana facility; but excluding all office clerical employees, all line coordinators, all professional employees, and all guards and supervisors as defined in the Act and all other employees.

(b) Failing and refusing to grant the above-described wage and benefit increases to bargaining unit employees because employees formed, joined, and assisted the Union and engaged in other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, in the manner set forth in the remedy section of the decision.

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit set forth above concerning changes in wages, benefits, and other terms and conditions of employment. The certification year shall extend 1 year from the date that such good-faith bargaining begins.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Wanatah, Indiana, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Electrical Workers,

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local 1393, AFL-CIO-CLC as the exclusive collective-bargaining representative of the employees in the following appropriate unit, by unilaterally failing and refusing to grant (1) annual wage increases to employees in the appropriate bargaining unit set forth below; (2) biannual wage increases to apprentice linemen and groundmen who are employees in the appropriate bargaining unit set forth below; and (3) matching 401(k) retirement plan contributions to employees in the appropriate bargaining unit set forth below, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to any changes in terms and conditions of employment:

All full-time and regular part-time linemen, crew leaders, groundmen, operators, apprentices and tree-trimmers employed by us at our Wanatah, Indiana facility; but excluding all office clerical employees, all line coordinators, all professional employees, and all guards and supervisors as defined in the Act and all other employees.

WE WILL NOT fail and refuse to grant the above-described wage and benefit increases to bargaining unit employees because employees formed, joined, and assisted the Union and engaged in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit concerning changes in wages, benefits, and other terms and conditions of employment. The certification year shall extend 1 year from the date that such good-faith bargaining begins.

KANKAKEE VALLEY RURAL ELECTRIC
MEMBERSHIP CORP.

Joanne C. Mages and Rebekah Ramirez, Esqs., for the General Counsel.

Darrel D. Jacobs, Esq., of Danville, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Valparaiso, Indiana, on August 12 and 13, 2002. The

charge was filed January 24 and amended March 26, 2002,¹ and the amended complaint issued May 15. The amended complaint alleges that Kankakee Valley Rural Electric Membership Corporation (the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) when it failed and refused to grant annual wage increases to the bargaining unit employees on January 2002 and failed and refused to grant apprentice linemen and groundmen biannual wage progression and step increases.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with a principal place of business in Wanatah, Indiana, is a public utility which provides electrical energy and related services. During the 12-month period ending December 31, 2001, the Respondent in conducting its business operations purchased and received at its Wanatah, Indiana facility goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

With the exception of 1 or 2 years the Respondent, in January of each year, has given its employees an annual wage increase since at least 1969 (Tr. 156-157). Additionally, the Respondent matches, up to a certain percentage, the employees' contribution to their 401(k) retirement plans. During at least the 4 previous years, if an increase in the matching percentage was given, it was also done in January. In January 2002, all hourly employees, except those in the bargaining unit, received a 2-1/2-percent wage increase and a one-half percent increase in the matching 401(k) contribution. Additionally, the Respondent maintains a 4-year apprenticeship program for linemen. The program requires that apprentices receive a wage step increase every January and July until they are paid the linemen rate. Groundmen also receive scheduled wage increases in January and July, until they are paid the top rate for groundmen. The Respondent refused to grant the scheduled wage increases to these bargaining unit classifications in 2002. On December 11, 2001, the Union requested, in accordance with the past practice, that the bargaining unit employees receive the same increases as those granted to nonbargaining unit employees. The Respondent, by letter dated December 20 refused, contending that the board of directors did not consider an in-

crease for those employees so as not to commit an unfair labor practice during the time the representation election was pending. (GC Exhs. 10, 11.)

The Union filed a petition for a representation election on October 18, 2001. The election was held on November 29 and the Union was certified as the bargaining representative on December 7. It was also around this time period that the Respondent and Marshall County REMC, a neighboring, but much smaller cooperative, discussed a possible merger. In April 2002, Marshall County REMC voted not to merge with the Respondent.

B. Contentions of the Parties

The General Counsel contends that the Respondent, by failing and refusing to grant the annual wage increase, and the increase in the matching 401(k) contribution, to bargaining unit employees, and by failing and refusing to grant the biannual wage step increases to apprentice linemen and groundmen in the bargaining unit, violated Section 8(a)(1) and (5) of the Act. The General Counsel also contends that the Respondent, by engaging in such conduct, is discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

The Respondent argues that it froze the wages of the bargaining unit employees based on a legitimate business reason, i.e., the wages of the bargaining unit employees were higher than the wages of the Marshall REMC employees in those classifications, thus the Respondent decided to freeze the wages of its employees pending its merger with Marshall REMC. It further offers that this decision was made before the Respondent knew of any union activity and was therefore under no obligation to bargain with the Union.

C. Discussion

1. The 8(a)(5) allegation

The complaint alleges that the Respondent by failing and refusing to grant the annual wage increase to bargaining unit employees, and by failing and refusing to grant the biannual wage step increases to apprentice linemen and groundmen in the bargaining unit, violated Section 8(a)(1) and (5) of the Act. Although the complaint does not mention the increase in the matching 401(k) contribution it is subsumed as part of the annual wage increase. Additionally, counsel for the General Counsel made it clear in her opening remarks that it was the subject of litigation, and the matter was fully litigated. The complaint also alleges that the Respondent engaged in such conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to its conduct and the effects thereof.

Section 8(a)(5) of the Act mandates that an employer must "bargain collectively with the representatives of his employees." Section 8(d) defines the duty to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

¹ All dates are in 2002 unless otherwise indicated.

² Although the unit description uses the term groundsmen, it appears that groundmen is correct and will be used in this decision. Counsel for the General Counsel's unopposed motion to correct the transcript is granted. (GC Br. 2 fn. 1, 3 fn. 3.)

Matters within the broad ambit of “wages, hours, and other terms and conditions of employment” are deemed mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Subject to exceptions not relevant here, the Act requires an employer to provide its employees’ representative with notice and an opportunity to bargain before instituting changes in any matter which constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962). Alteration of existing terms and conditions of employment without prior discussion with its employees’ bargaining representative is a “circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.” *Katz*, supra at 743. In *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), the Board cited *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970), as setting forth a standard for whether an unlawful change has been implemented which

[N]either distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement, and condemns the conduct if it has.

Matching 401(k) fund contributions constitute a term and condition of employment. *Britt Metal Processing*, 322 NLRB 421 (1996). If, as here, an employer has made a “particular benefit part of the established wage or compensation system, then [the employer] is not at liberty unilaterally to change th[e] benefit either for better or worse during . . . the period of collective bargaining.” *Dothan Eagle*, supra at 98; *Daily News*, supra at 1238.

The Respondent asserts that its decision to freeze the wages and matching 401(k) fund contributions of the bargaining unit employees was made before the advent of the Union, and the decision was merely implemented in January 2002. In order to prevail on this matter the Respondent must prove that its decision was made before November 29, 2001, the election date. *Kirkpatrick Electric Co.*, 314 NLRB 1047, 1049 (1994). To this end the Respondent presented Dennis Weiss, its chief executive officer.

Weiss states that as a result of merger discussions with Marshal REMC, on or about October 12, 2000, he knew that the Respondent’s linemen were paid approximately \$2 an hour more than the Marshal REMC linemen, who were unionized. Weiss thought this pay disparity would be a problem with a merger. Weiss states that almost a year later, October 10, 2001, he decided that the answer to this problem was to freeze the wages of the outside employees (outside employee is the industry term for the employees in the appropriate bargaining unit). Also on October 10, Weiss presented this problem to his staff. Weiss admitted that he did not announce his decision when he presented the problem. He stated that his preferred method of working with his staff is to give them information, so as to allow them to arrive at a decision independently, rather than him dictating a decision. He explained his lack of candor by stating his belief that when employees take part in a decision (or apparently are led to believe that they are part of the decision making process) they support it

more fully (Tr. 231). Be that as it may, there is no evidence that his staff ever arrived at any decision regarding the wage disparity. Weiss further admitted that he told no one of his decision, until he presented his wage proposals to the board of directors, and that there is no documentary evidence of when he made the decision (Tr. 29, 236).

Weiss stated that he made his wage and benefit proposals to the board of directors on November 12, 2001. Although he recommended a 3-percent wage increase for all hourly non-bargaining unit employees, the Board approved a 2.5-percent increase in wages and a one-half percent increase in the Respondent’s 401(k) matching contribution (GC Exh. 4). If Weiss is to be believed both his decision to freeze the wages of the bargaining unit employees and the board of directors adoption of his decision both occurred before the November 29 election date, and thus before the Respondent had a duty to bargain with the Union.

a. Credibility

This case turns on Weiss’ credibility. I have closely observed his testimonial demeanor and find that he does not appear to be a candid and truthful witness. In addition to his demeanor his testimony contains inaccurate and inconsistent statements which further demonstrate his apparent lack of candor. Thus, Weiss initially states that at the October 10 staff meeting he provided his staff with a summary page entitled “Manager’s Survey Results” (R. Exh. 7) in addition to the sheets of the Statewide Manager’s Association survey. Although Weiss admits that he did not know the exact day that the summary page was prepared, he unequivocally states that it was before the October 10 staff meeting. He further declares that it was “at this point,” that he knew that he “was going to freeze the wages” of the outside employees (Tr. 187).

However, after questioning by counsel for the General Counsel and repeating, again, that he gave the summary to his staff on October 10, Weiss admitted that it could not have been prepared on that date and that it must have been prepared after the meeting. This admission was garnered after counsel for the General Counsel established that the document had two columns, one headed “Kankakee Valley’s Benefit” and the other, “Kankakee Valley’s Benefit (union).” Weiss, after initially denying knowledge of why there was a “union” column, later explained that the “0.00%” in the union column and the “2.50%” in the other column represented the 2002 average wage increases that he had proposed to the Board. Counsel for the General Counsel then pointed out that the “2.50%” amount was the wage increase that the board approved, but that Weiss had proposed a 3-percent increase. After being confronted by these obvious inconsistencies Weiss was forced to recant his testimony. He admitted that he had no idea when the document was prepared, but that it could not have been prepared before the October 10 staff meeting. He also admitted that the summary was not, and could not, have been prepared in anticipation of presenting it to the board of directors. (Tr. 225–230.)

Counsel for the General Counsel also questions Weiss’ credibility concerning the date when he allegedly submitted his wage recommendations to the board of directors for fiscal year 2002. Counsel for the General Counsel argues in brief that the “Re-

spondent's evidence regarding this matter was inconsistent, and should be treated with great suspicion." Weiss stated that it was at the November 12 board of directors meeting that he presented his budget recommendations for fiscal year 2002 (GC Exh. 4 2002 wage adjustment). He recommended a 3-percent wage increase for "those employees not utilizing a bargaining unit on 01-01-2002." The minutes of the board meeting indicate that the Board approved a 2.5-percent wage increase, a one-half percent increase in the matching 401(k) contribution, and a paid holiday after Thanksgiving for nonbargaining unit employees. The minutes further state that wages and benefits for the bargaining unit employees will be negotiated in a contract.

Weiss, in a tortured explanation, said that because the Respondent was in the midst of a representation election he could not "at this meeting" state that he was going to freeze the bargaining unit employees' wages, as he had allegedly decided to do. Weiss admits that he reviewed the minutes of the meeting, and thus he had to know that they contained at least one falsehood. According to Weiss' version, unlike what is written in the minutes, wages and benefits would not be negotiated because he had already unilaterally decided that the wages would be frozen. He submits that he believed that it was necessary to freeze the bargaining unit employees' wages in order to close a wage gap with another employers employees, which would only be of significance should the employers ever merge. Even if this version was believable, Weiss never explained how denying the bargaining unit employees a paid holiday would in any way close the wage gap.

Counsel for the General Counsel also points to a memo that was inserted in the employees pay envelopes on January 4, 2002, as being inconsistent with Weiss' testimony regarding the date of the board meeting. The memo states that the wage and benefit increases were approved at the December 2001 board meeting (GC Exh. 3). When confronted with the memo Weiss merely said that he believed that his assistant had made a mistake. His statement was not corroborated. Weiss also changed his testimony overnight on this subject. In response to counsel for the General Counsel's question at the beginning of the trial, Weiss appeared unsure of whether the meeting when the board of directors approved the wage increases occurred in November or December. He attributed his uncertainty to the fact that sometimes he presented the wage increase to the board in November and sometimes in December (Tr. 27). Not 24 hours later, also in response to a question from the counsel for the General Counsel, all doubt was removed, and Weiss states that "every year since I've been CEO (4 years), it (the wages) are addressed in November."

Notwithstanding counsel for the General Counsel's concern regarding the date of the board of directors meeting, the date is not crucial. Regardless of when the meeting occurred the minutes do not lend credence to Weiss' statements that he had previously decided to freeze the wages of the bargaining unit employees because of a pending merger. The minutes state the opposite, that the wages and benefits for the bargaining unit employees would be negotiated. The reason advanced by the Respondent for not granting the increases to the bargaining unit employees, in a letter to the Union dated December 20, was "so as not to commit an Unfair Labor Practice." This reason was

reiterated by Weiss during a January 2002 meeting with employees. All employee witnesses credibly testified that Weiss said that he did not grant them a wage increase because he "did not want to commit an unfair labor practice." Weiss did not refute their testimony.

b. Conclusion

Based on the foregoing, I find that the Respondent has failed to prove that it had no duty to either continue its established practice of making annual wage and benefit adjustments, or to notify and provide the Union with an opportunity to bargain about those mandatory subjects. By refusing to grant annual wage increases, biannual wage step increases, and an increase in matching 401(k) contributions to bargaining unit employees, the Respondent has violated Section 8(a)(1) and (5) of the Act.

2. The 8(a)(3) allegation

Counsel for the General Counsel argues that the Respondent withheld the annual increases from its represented employee's in order to punish them for selecting a union as their representative.

Section 8(a)(3) prohibits employer "discrimination [against employees] in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization." The methodology for determining discriminatory motivation is set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the employer's action. To sustain the burden, the General Counsel must show that the employees were engaged in protected activity, that the employer was aware of the activity, and that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial or direct evidence and is a factual issue, which the Board's expertise is peculiarly suited to determine. Proof of the protected activity, employer knowledge, and animus toward the activity supports an inference that the employees' protected conduct was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Wright Line*, *supra* at 1089. The employer may rebut the General Counsel's case by proving that animus played no part in its actions or, by establishing as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected conduct. The employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

Counsel for the General Counsel submits that the 8(a)(5) violation establishes animus sufficient to serve as a predicate for finding a violation of Section 8(a)(3), *Asarco, Inc.*, 316 NLRB 636, 643 (1995). Additionally, she cites to the credible testimony of employee Scott P. Sikorau. He testified that shortly before the election Weiss, at a meeting with the bargaining unit employees, was asked by an employee that if the Union was not voted in could the employees negotiate with him. Weiss re-

sponded that he had a “sweet package” for them, but telling them about it would be an unfair labor practice. Weiss’ testimony is somewhat different. He testified that an employee at the meeting asked him if the employees could form a committee to bargain over wages and benefits. Weiss replied that he could not answer that question but if it had been asked before the employees had signed the authorization cards, they would have liked his answer. Regardless of which version is most accurate the impact on the employees is the same—that their wages and benefits would be better without the presence of the Union. Even without that statement “[t]iming alone may suggest anti-union animus as a motivating factor in an employer’s action.” *Masland Industries*, 311 NLRB 184, 197 (1993), quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984), and the timing in this case warrants the inference.

I have discredited the reason advanced by the Respondent for not granting the bargaining unit employees their annual wage and benefit increases. Moreover, having closely observed the testimonial demeanor of the Respondent’s chief executive officer I find not only that his testimony appears incredible but that the truth is the opposite of his story. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Accordingly, I find that the reason asserted by the Respondent for its conduct was not relied upon and is a pretext to hide the actual reason which is, as argued by the counsel for the General Counsel, to punish the bargaining unit employees for engaging in protective concerted activity.

CONCLUSION

I find that the counsel for the General Counsel has met the initial burden under *Wright Line*, supra. I further find that the Respondent has failed to establish that its action would have taken place in the absence of the employee’s protective activity. I find the reason offered by the Respondent for its actions is a pretext and that the real reason is to discourage employees from engaging in protected activity. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Kankakee Valley Rural Electric Membership Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 1393, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time lineman, crew leaders, groundmen, operators, apprentices and tree trimmers employed by the Employer at its Wanatah, Indiana facility; BUT EXCLUDING all office clerical employees, all line coordinators, all professional employees, and all guards and supervisors as defined in the Act and all other employees, constitute a unit appropriate for collective bargaining within the meaning of Section 2(5) of the Act.

4. Since December 7, 2001, the Union has been and is the exclusive collective-bargaining representative of the Respondent’s employees in the unit described above.

5. The Respondent has violated Section 8(a)(1) and (5) of the Act by engaging in the following conduct.

(a) Since January 1, 2002, failing and refusing to grant annual wage increases to employees in the unit.

(b) Since January 1, 2002, failing and refusing to grant biannual wage increases to apprentice linemen and groundmen who are employees in the unit.

(c) Since January 1, 2002, failing and refusing to grant matching 401(k) retirement plan contributions to employees in the unit.

6. The Respondent has violated Section 8(a)(1) and (3) of the Act by discriminatorily failing and refusing to grant annual and biannual wage increases and matching 401(k) retirement plan contributions to employees in the unit which were granted to nonunit employees, in order to discourage their membership in the Union.

7. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent has unilaterally and discriminatorily failed and refused to continue its established practice of granting employees annual and biannual wage increases and matching 401(k) retirement plan contributions to employees in the unit, accordingly, I recommend that the Respondent make whole the unit employees for the monetary loss they suffered as a result of the Respondent’s unlawful conduct. The amounts due the employees are to be paid with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any additional amounts the Respondent must pay into the 401(k) retirement plans shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

The General Counsel requests that the certification year be extended for 1 year from the date that the Respondent’s unlawful conduct has been fully remedied. The General Counsel seeks a remedy consistent with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), where the Board adopted the policy that a newly certified Union is entitled to 1 year of actual bargaining following the certification without outside interference such as a rival petition or another election. The Board held that in computing that 1 year period it would toll periods of time when the employer had refused to bargain. Here the Respondent has refused to grant, or bargain about, the bargaining unit employees’ annual and biannual wage increases and matching 401(k) retirement plan contributions since December 20, 2001, almost immediately after the certification of the Union. Although the record indicates that the parties began bargaining in February 2002, they have agreed to defer negotiations on economic items until all noneconomic items have been settled. In essence the Respondent, by its unlawful conduct, has deprived its employees of the effective services of their selected bargaining agent, at least regarding wages and

benefits, since December 20, 2001. To place the Respondent and the Union in as nearly the same situation as possible to that which existed before December 20, 2001, the initial year of certification shall be construed as beginning on the date that the Respondent

fully remedies its unfair labor practices. See *Bierl Supply Co.*, 179 NLRB 741 (1969).

[Recommended Order omitted from publication.]